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ABSTRACT

Never enjoying the strong protection afforded to other First Amendment-related speech, academic freedom has been buffeted by a series of seemingly conflicting legal decisions. This paper explores the case that focuses on an allegation that faculty members of Vincennes University, a two-year school in Indiana, were discriminated against because of their expression. Specifically, three faculty members at Vincennes filed suit against the university (Powers v. Summers) claiming they were denied merit raises because they had complained about how Vincennes treated its faculty. While there are numerous legal issues relevant to this case, those having to do with academic freedom and freedom of expression are the focus of the paper. The paper briefly discusses the relevant facts of the case, analyzes the ruling of the court as it affects academic freedom and freedom of expression, contrasts and compares this case with some other cases, and discusses the implications that this case and other cases may have on academic freedom and freedom of expression. This brief analysis of Powers v. Summers suggests that there appears to be decreasing support, both legally and rhetorically, for academic freedom. (NKA)

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"It's Still Alright to Complain (At Least for the Moment): Vincennes University and the Angry Professors"

Paper presentation at the 2001 NCA Convention

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As a legal principle, academic freedom has had some rough going these past few years. Never enjoying the (sometimes) strong protection afforded to other First Amendment-related speech (Hofstadter and Metzger, p. 403), academic freedom has been buffeted by a series of seemingly conflicting legal decisions. In one case, the Third Circuit Court of Appeals ruled that a university had the right to fire a tenured professor after than professor refused to change a grade at the order of the school president (Brown v. Armenti). In another case, the Sixth Circuit Court of Appeals ruled that a nontenured faculty member's use of language a student deemed offensive and hostile was protected speech (Hardy v. Jefferson Community College). In a third case, the same Sixth Circuit ruled that another professor's speech, yet again deemed offensive and hostile by a student, was not protected expression (Bonnell v. Lorenzo). The distinction, which will be more fully explored later, had to do with the educational use of the speech and the public nature of the topic.

The specific case (Power v. Summers) that this essay explores focuses on an allegation that faculty members of Vincennes University, a two-year school in Indiana, were discriminated against because of their expression. While there are numerous legal issues relevant to this case, those having to do with academic freedom and freedom of expression will be the focus of this essay. In this essay, I will briefly discuss the relevant facts of the case, analyze the ruling of the court as it affects academic freedom and freedom of expression, contrast and compare this case with the other cases mentioned above, and discuss the implications this and other cases may have on academic freedom and freedom of expression.

Complaints at Vincennes

Three faculty members at Vincennes University, a two-year institution located in southwestern Indiana (Lords), filed a suit against the University claiming they were denied merit raises because they had complained about how Vincennes treated its faculty. The three faculty members, Bernard J. Verkamp, Jeffrey S.Huxley, and Douglas M. Power, had spoken publicly about what they perceived to be the university's poor policy of paying faculty members and of protecting tenured faculty members during academic layoffs (Lords).

The Vincennes University Board of Trustees, acknowledging the university was below average in faculty salaries, had, in 1995, created a "catch-up" salary raise. The raise was not across the board, but was designed to be a form of merit pay. Sufficient funding was available for an average per faculty member increase of approximately $1000.00 (Power v. Summers, 819).

The three faculty members, who had performance evaluations ranging from average to excellent, received increases of $400. Their suit argues that the increases were lower solely because they had been publicly commenting about the university administration. Receiving a lower wage increase because of what they had said, the three argued, was a violation of their First Amendment rights. The remedy they sought was an injunction ordering the university to raise their salaries to the level they would have been had they not received lower salary increases because of alleged retaliation on the part of the university (Powers v. Summer, 818).

The three sued the president of the university, other university officials, and the Board of Trustees. The president was sued in both his official and individual capacity, while the trustees were sued only in their official capacity. At the district level, the judge,

Larry J. McKinney, dismissed the claims against all defendants in their official capacity, ruling that the Eleventh Amendment barred suits against state officials acting in their official capacity, and then granted summary judgment on the individual capacity complaints (818). Plaintiffs appealed both decisions, and the case was heard by a three judge panel of the 7th Circuit Court of Apeals.

What the Court Said

At the appellate level, the court first took care of some procedural work. The district court, said the appellate judges, had made the right decision in denying the suit against the officials in their official capacities, but had reached that correct decision by wrong reasoning. The appellate court argued that under 42 U.S.C § 1983, from which the plaintiff-appellants developed their original suit, barred suits against states. The Eleventh Amendment need not be appealed to.

After dismissing the procedural question, the appellate judges moved to what they saw as the contested part of the decision: Did the action by the university rise to the level of retaliation against the plaintiff-appellants? And, if so, were there grounds for a suit against the president in his individual capacity?

First, the appellate court argued that the plaintiff-appellants' request for an injunction requiring that the university raise their salaries to the level they would have been had there been no alleged retaliation was an acceptable use of the law. With that cleared away, the appellate judges moved to the major question.

The appellate court found that the district court erred in ruling that the denial of raise was not a potential restriction on the plaintiff-appellants' First Amendment rights. Essentially, the appellate court argued that, when touching upon matters of the First Amendment, "[a]ny deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable . . . " (Powers v. Summer, 820). Additionally, the court ruled that the raises, even if they were found to be discretionary, could reasonably be viewed as retaliatory practices by the employer, and therefore could be seen as actionable.

The appellate court, therefore, remanded the case to the district court, with the instruction to retry the case consistent with the findings of the appellate court. As of October 29th, 2001, no further decisions in this case have been found.

In sum, the appellate court gave directions to lower courts (at least those in the 7th Circuit) that, when the First Amendment is implicated in cases of alleged workplace discrimination or retaliation, courts must carefully consider such claims, and should not, as a matter of course, routinely shield state officials and agencies from such suits (Lords). In this case, then, academic freedom appears to have survived a challenge.

Mixed Messages?

In other cases, however, academic freedom has not always received the support found above. There appear to be significant differences in the interpretation of existing law and precedent applying to academic freedom. In one victory for academic freedom, Kenneth Hardy, an adjunct instructor of communication at Jefferson Community College in Kentucky, was vindicated by the 6th Circuit Court of Appeals (of course, not until after he was let go from his position).

Hardy

As part of his standard lecture on the power of language in his interpersonal communication class, Hardy led a class discussion on "how language is used to

marginalize minorities and other oppressed groups in society" (Hardy v. Jefferson Community College). The class discussion resulted in students offering as words that oppress such examples as "girl," "lady," "Faggot," "nigger," and "bitch." Students took part in the discussion and reported that the discussion was academically useful.

One student, an African-American female, objected to the language used, and argued that the activity was a violation of Hardy's class policy forbidding such language in the classroom. She brought her complaint to Hardy, who apologized for the activity. The student also took her concern to her minister, who in turn complained to the college administration and threatened that such classroom activities could hurt enrollment among African-American students at the college.

The college administration met with Hardy to discuss the issue, and expressed concern with the use of such language, despite Hardy's explanation of the educational usefulness of the activity, and his claim of academic freedom.

Hardy was not rehired to teach the next term. He filed suit claiming violation of his First and Fourteenth Amendment rights, and contended that the college and its administrators had "retaliated against him for exercising his rights of free speech and academic freedom" (Hardy). At the District Court level, the court ruled that the college and its administrators were immune from suit, as they were agents of the state. They were not, however, as with the Vincennes case, immune from suit as individuals. Qualified immunity, the court argued, would require that the individual administrators would have to show that their conduct did not violate statutory or constitutional rights as determined by a reasonable person.

The District Court found, and the appellate court agreed, that Hardy's speech was protected by the First Amendment, and that the college administrators should have known they were violating that protection. The court ruled that Hardy's discussion of offensive language "touched upon a matter of public concern," and was therefore protected by the First Amendment (Hardy). Furthermore, the court also found that Hardy's interest in communicating these ideas outweighed the state's interest in maintaining academic control by regulating his speech. In other words, it was more important that Hardy be able to use this language than for the college to say that he could not.

In determining that Hardy's interest in communicating his ideas outweighed the college's right to regulate the speech of employees, the court found that the limited disruption caused by Hardy (or, more accurately, by the reaction of others to Hardy's speech) was not sufficient to allow the college to restrict his speech.

The court distinguished this case from *Bonnell* (discussed below) by arguing that the language used in Hardy was relevant to an educational purpose, while the language in *Bonnell* was not, and was therefore not constitutionally protected.

Bonnell

Academic freedom, it seems, does not extend to professors who use language that has little if any relevance to the educational topic at hand, even if it does touch upon matters of public concern.

In *Bonnell*, the same 6th Circuit reversed a lower court decision ordering Macomb Community College to end the suspension of English instructor John Bonnell. Bonnell had been accused of sexual harassment and creating a hostile learning environment

through repeated uses of "vulgar and obscene" language, such as "fuck," "cunt," and "pussy."

The court ruled that Bonnell's use of this language in his classroom was probably not protected speech, because it was not germane to the classroom. In this case, the right of the college to promote learning and to control the speech of its employees outweighed the right of the instructor to state his expressions however he saw fit.

Bonnell had also made public the complaint against him, in a very public and rather sarcastic manner. The court did find that Bonnell was probably engaged in protected speech when he took this action, as his discussion of the complaint clearly touched upon matters of public concern. In sum, Bonnell could not use non-germane vulgar and obscene language in his classroom, but he was most likely protected when he then complained about his treatment for using such language.

In its own use of language, the court employed some reasoning that it seemed to step back from in *Hardy*. The court noted that academic freedom "is not an independent First Amendment right," and that there are two conceptions of academic freedom—freedom for the individual professor and freedom for the educational institution, and that these freedoms are often in conflict: " . . . a professor's right to academic freedom is not absolute, and the autonomous decisionmaking of the College must be considered" (*Bonnell*).

Brown

These two conceptions of academic freedom are highlighted in this last case. Robert A. Brown, professor at California University of Pennsylvania, filed suit against the University and its president, Angelo Armenti, accusing the university of violating his rights by retaliating against him and infringing upon his academic freedom and First Amendment rights. Brown had failed a student in one of his classes, after the student allegedly only attended three of the 15 class sessions. Armenti ordered that the grade be changed to an incomplete. Brown refused. The university suspended Brown, and two years later, terminated his employment.

The 3rd Circuit Court of Appeals ruled in favor of the university. Essentially, the court ruled that academic freedom more appropriately lies with the university, not the individual professor, and that the university, as employer, has the right to determine how that academic freedom is used.

The court cited a previous case, *Edwards*, in support of its finding that the university is the "speaker," and the professor is just the agent of the university. In essence, the university's right to conduct education as it sees fit trumps any individual rights of the professor. By this reasoning, since assigning a grade is part of the educational process, the university has the ultimate right, not the professor, to determine the grade.

So What's Going on With Academic Freedom?

In most of these "mixed messages" from above, there does seem to be some consistency. First, members of the academic community generally enjoy the same right as members of the general public in speaking about issues of public concern. Second, claims for academic freedom are more likely to be supported if the expression at issue can be construed as relevant to the educational process (Pickering v. Board of Education; Bonnell v. Lorenzo). Third, the interest of a university to promote "the efficiency of the

public services it performs through its employees" (Pickering, 568) does not necessarily outweigh the academic freedom rights of an individual professor.

Legally, academic freedom is at best a secondary appeal in cases of college and university faculty who feel that their expression and activities, both inside and outside of the classroom, have been infringed upon. There is as yet no definitive statement clarifying the bounds and protections of academic freedom, at least none comparable to the freedoms associated with other areas of First Amendment law (given that many of these areas are also rather murky).

Rhetorically, the appeal of calling on "academic freedom" as a support for the actions of faculty also seems to be on the wane. Coinciding, perhaps, with the recent increase in attacks on the tenure system of academe, are attacks on academic freedom as a special privilege undeserved and perhaps unneeded by faculty. Why, after all, should faculty have more protection for what they say and do than other members of the public? (Bhagwati and O'Flaherty).

This brief analysis of the Power v. Summers case, as well as a quick look at some other recent cases touching upon academic freedom and the First Amendment, certainly does not provide all the answers to the question of what is going on with academic freedom today. This paper does, however, offer at least some insight to what appears to be decreasing support, both legally and rhetorically, for academic freedom.

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